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ATTORNEY'S LIABILITIES UNDER ERISA

The proliferation of private pension plans¹ in America is a relatively modern phenomenon, primarily attributable to economic changes in this country since World War II.² By way of

¹ A private pension plan is one established by an employer, a group of employers (commonly referred to as a multi-employer plan) or a union or other group of employees. Use of the term private pension plan does not contemplate the inclusion of governmental or military pension plans. The private pension plans will be collectively referred to as the private pension system.

² A discussion of the factors influencing the growth of pension plans appears in the *ALI-ABA TAXATION PRACTICE HANDBOOK*:

The first known private pension plan in the United States was started in 1875 by the American Express Company. In the late nineteenth and early twentieth centuries few plans were set up, and of these many were informal and loose arrangements. Most of the early plans were established by large corporations, and participation was often limited to the office or white-collar workers. By 1925 only about four hundred pension plans were in operation; these covered four million workers, a third of whom were employed by four giant corporations—U.S. Steel Corporation, the Pennsylvania and New York Central railroads, and the American Telephone and Telegraph Company. Most unions considered pensions paternalistic and had no interest in them, although a few, such as the International Typographical Union in 1908, did start their own pension plans financed out of membership dues. In general, however, there was little interest in pension plans.

The situation changed dramatically in the 1930's and 1940's. As shown during the Depression, the average man in a modern industrialized economy is unable to make dependable arrangements for his own security if he is limited to his individual means. The growth of urban living and urban employment tends to put older people on their own in making living arrangements and at the same time restricts their chances for earning a livelihood. It was once usual for several generations to live under one roof—today, urbanization has fragmented the family unit.

Passage of the Social Security Act in 1935 established a minimum pension base on which employers could build a private plan. During World War II, the freeze on wages and salaries increased the growth of fringe benefits, including pensions and health and welfare plans, which were exempt from the freeze. Since wartime personal and corporate income tax rates were extremely high and the costs of pension and welfare plans were tax-deductible to the employer, these plans became an attractive means of competing for scarce employees.

During the postwar prosperity, organized labor reversed its attitude of disinterest toward pension plans. In the *Inland Steel* case (1949), the U.S. Supreme Court held that pensions are subject to collective bargaining. Soon, management and union representatives negotiated pension plans in the steel and auto industries, then in other mass-production industries, and finally throughout American business.

illustration, in 1940 an estimated four million employees were covered by private pension plans; by the early 1970's this number had grown to over thirty million employees who comprised nearly half of the private non-agricultural work force.³ This rapid growth rate may be attributed to a sense of responsibility on the part of private industry for the economic welfare of employees beyond their productive years of service as well as an expression of dissatisfaction on the part of employees with the inadequacies of governmental retirement compensation.⁴

The vast accumulation of funds required to provide benefits created under private plans has placed the private pension system in a position to influence the fundamental components of our national economy.⁵ Yet, in spite of various Congressional attempts to control the administration of such plans,⁶ the private pension system represented the largest private accumulation of substantially

D. ROTHMAN, ESTABLISHING & ADMINISTERING PENSION & PROFIT SHARING PLANS & TRUST FUNDS 1-2 (ALI-ABA TAXATION PRACTICE HANDBOOK Series No. 20, 1967).

³ H.R. Rep. No. 93-533, 93rd Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4639, 4641.

⁴ *Id.* at 4640.

⁵ It is estimated that employee pension funds control more than one-third of the equity capital of America's public-owned companies, more than enough to give them voting control. It is projected that by the mid-1980's the equity ownership by pension funds will rise to 50% or more. Drucker, *American Business's New Owners*, Wall St. J., May 27, 1976, at 22, col. 4.

⁶ In 1958, Congress enacted the Welfare and Pension Plans Disclosure Act to protect plan participants and beneficiaries from the unauthorized use of pension funds. Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed by ERISA, 29 U.S.C.A. §§ 1001-1381 (1974)). Under this Act, plan administrators were required to make certain disclosures. The Act was amended in 1962 to make theft, embezzlement and bribery or kickbacks involving pension funds or pension officials federal crimes. Pub. L. No. 87-420, 76 Stat. 42 (1962) (repealed by ERISA, 29 U.S.C.A. §§ 1001-1381 (1974)). Nonetheless, the legislation proved ineffective since the individual participants were responsible for the policing aspects of plan administration. Pub. L. No. 85-836, §§ 2-10, 72 Stat. 997 (1958) (repealed by ERISA, 29 U.S.C.A. §§ 1001-1381 (1974)). Regulations imposed by the Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141-188 (1975), the Labor Management Reporting Disclosure Act of 1959, 29 U.S.C.A. §§ 401-531 (1975), and the Internal Revenue Code, I.R.C. §§ 401(a), 402(a), and 501(a) provided few, if any, safeguards. Nonetheless, in the absence of controlling federal statutes, plan participants were often forced to resort to the various states' common law of trusts in order to enforce their equitable rights to plan assets. See generally RESTATEMENT (SECOND) OF TRUSTS § 164 (1959). Many of these equitable claims were then denied due to strict interpretations of technical plan provisions by state courts. As more private pension plans terminated and participating employees were denied the benefits upon which they had been relying for retirement, pressure mounted for government intervention.

unregulated funds in the country⁷ prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA).⁸

ERISA represents the latest attempt by Congress to provide an adequate private retirement system for the growing American work force.⁹ It substantially supercedes prior legislation and contains comprehensive funding¹⁰ and vesting requirements,¹¹ prudent investment standards¹² and stringent guidelines for the adoption and administration of a private pension plan.¹³ To promote unified regulation of the private pension area, ERISA establishes broad federal jurisdiction for administration of its provisions with a concurrent general preemption of state law in this area.¹⁴ Much of

⁷ H.R. Rep. No. 93-533, *supra* note 3, at 4641.

⁸ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C.A. §§ 1001-1381) [hereinafter cited as ERISA].

⁹ It has been suggested that Congress was motivated to enact ERISA in an attempt to make business and government partners in providing for the retirement needs of the public due to the declining stability of the Social Security system. Dondanville, *The Pension Reform Act: The Civil Liability View*, 43 INS. COUNSEL J. 556 (n.76) *citing* P. DRUCKER, *THE UNSEEN REVOLUTION: HOW PENSION FUNDED SOCIALISM CAME TO AMERICA*.

¹⁰ ERISA §§ 301-306, 29 U.S.C.A. §§ 1081-1086 (1974).

¹¹ ERISA § 203, 29 U.S.C.A. § 1053 (1974).

¹² ERISA § 404, 29 U.S.C.A. § 1104 (1974).

¹³ ERISA §§ 101-111, 29 U.S.C.A. §§ 1021-1031 (1974).

¹⁴ Section 514(a) of ERISA provides that, except for causes of action arising prior to January 1, 1975, the ERISA provisions "supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144(a) (1974). Subsection (c) of section 514 provides that "[t]he term state law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C.A. § 1144(c) (1974). This preemption does not invalidate state insurance, banking, or security regulations, however. ERISA § 514(b)(2)(A), 29 U.S.C.A. § 1144(b)(2)(A) (1974). In interpreting these preemption provisions, the courts have held that Congress intended "absolute preemption of the field of employee benefit plans." *Azzaro v. Harnett*, 414 F. Supp. 473, 474 (S.D.N.Y. 1976).

Where state law is preempted and no specific federal statute is applicable, courts are not powerless. It has been held that "Congress has invested the courts with a duty to create law governing aspects of employee benefit plans not specifically regulated by ERISA." *Wayne Chemical v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 321 (N.D. Ind. 1977). This interpretation is supported by the remarks of Senator Javits, speaking on behalf of the conference version of ERISA:

In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing State termination insurance programs, et cetera, will be superseded. It

ERISA is intricately interwoven and the statutory provisions are augmented by regulations and interpretations promulgated by the Department of Labor and the Treasury Department.¹⁵

The highly technical nature of these extensive regulatory provisions and the confusion and duplication generated by their joint administration have hampered efforts at plan modification and amendment which would bring existing plans into compliance with the vesting, funding, and reporting requirements of the Act. Indeed, many attorneys and plan advisors have found themselves overwhelmed with the task of making the adjustments and revisions necessary to meet the tax qualifications and substantive requirements of ERISA. This preoccupation with technical compliance has, therefore, caused the new civil¹⁶ and criminal¹⁷ liability provisions of the Act to be largely overshadowed. These liability provisions, however, have serious implications for all professionals, especially attorneys, who service private pension plans. Since the liability provisions are a rather recent development,¹⁸ few civil actions have been litigated thus far under the sanctions.¹⁹ However, with the value of private pension assets expected to grow to \$225 billion by 1980,²⁰ the number of civil liability suits and the cost of professional malpractice insurance for the attorney who services private pension plans could escalate very rapidly. Since an attorney may act in any one of a number of capacities in connection with a private pension plan, his or her liability under the various

is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.

120 Cong. Rec. 15751 (daily ed. August 22, 1974), *quoted in Wayne Chemical* at 321-22.

¹⁵ The Department of Labor and the Treasury Department were given overlapping authority to enforce the provisions of ERISA and to issue interpretive pronouncements regulating its administration. ERISA § 3004, 29 U.S.C.A. § 1204 (1974), *prior to amendment* by Act of Nov. 6, 1978, ERISA Reorganization Plan, No. 4 of 1978, 43 Fed. Reg. 47713 (1978).

¹⁶ ERISA § 502, 29 U.S.C.A. § 1132 (1974).

¹⁷ ERISA § 501, 29 U.S.C.A. § 1131 (1974).

¹⁸ The liability provisions of ERISA enacted in 1974 are substantially different from those under previous legislation. *Compare* ERISA §§ 501-502, 29 U.S.C.A. §§ 1131-1132 (1974) with the Welfare and Pension Disclosure Act of 1958, Pub. L. No. 85-836, §§ 2-10, 72 Stat. 997 (1958).

¹⁹ See cases discussed in text accompanying notes 33 and 83 for examples of the considerations involved.

²⁰ S. REP. NO. 93-383, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE & AD. NEWS 4639, 4891.

civil and criminal provisions of ERISA may vary accordingly. The statutory duties and responsibilities imposed on an attorney acting as a plan fiduciary, for example, differ substantially from those required of an attorney acting as a party-in-interest or as an advisor to a plan administrator. Thus, it is essential that the definitional aspects of the statute be examined, as well as the rules and regulations issued by the Department of Labor and the Treasury Department as related to the specific positions that may be occupied by an attorney servicing a private pension plan. The remainder of this note deals with liability exposure under the Act for counsel to a private pension plan, with particular emphasis on the advisor of a small plan with less than one hundred participants.²¹

CIVIL AND CRIMINAL LIABILITY UNDER ERISA

Part V of ERISA imposes certain civil and criminal sanctions for violation of the Act's substantive requirements. Criminal penalties consisting of up to \$100,000 in fines for corporations and imprisonment of up to one year or fines up to \$5,000 for individuals may be imposed for the willful violation of certain reporting and disclosure requirements of ERISA.²² These criminal penalties supplement those imposed under the Labor Management Relations Act.²³ The civil sanctions of ERISA have even more potentially pervasive application than do the criminal penalties. Section 502(a)(1),²⁴ for example, provides that a plan participant or beneficiary may file a civil suit against any administrator who refuses to comply with a request for information which must be furnished under the Act.²⁵ The administrator may be personally liable in such instances to the complaining party by way of a judgment for up to \$100 per day of noncompliance measured from the date of the administrator's first refusal to supply the information.²⁶ In addition, any participant or beneficiary may bring an action to

²¹ Most plans with less than one hundred participants are accorded certain administrative exemptions, such as exemption from the requirements for an annual audit. 29 C.F.R. § 2520.104-46 (1978).

²² ERISA § 501, 29 U.S.C.A. § 1131 (1974).

²³ See 18 U.S.C.A. § 664 (1976). See also H. CONF. REP. NO. 93-1280, 93rd Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4639, 5106.

²⁴ 29 U.S.C.A. § 1132(a)(1) (1974).

²⁵ Such information is required by ERISA §§ 101-109, 29 U.S.C.A. §§ 1021-1029 (1974).

²⁶ ERISA § 502(c), 29 U.S.C.A. § 1132(c) (1974).

recover accrued benefits or to enforce prescribed rights under a plan.²⁷ These parties may also seek a declaratory judgment to clarify any disputed right to future benefits.²⁸ An injunction may be sought under the Act by any plan participant, beneficiary or fiduciary to prevent transactions which would transgress the substantive proscriptions of ERISA.²⁹

In addition to the rights and powers vested in interested parties, section 502 of the Act gives the Secretary of Labor broad power to bring civil actions on behalf of plan participants and beneficiaries.³⁰ This provision was necessary to counteract the inherent deficiencies in self-policing regulatory statutes that had been experienced in prior legislation.³¹ It could be anticipated that few participants or beneficiaries would have the resources to sustain a civil action under ERISA provisions, especially in light of the relative monetary amounts involved. In many instances the cost of litigation could no doubt exceed the benefits sought to be recovered. Thus, the representative authority of the Secretary of Labor was intended to provide a viable means for the enforcement of substantive private rights. A similar vehicle is found in section 502(g) which provides that in any civil action brought under ERISA, the court may, at its discretion, allow reasonable attorney fees and court costs as an element of the recovery.³² Thus, this means of fully compensating the complaining party for the cost of litigation can have a significant impact on the accessibility to the courts of plan participants and beneficiaries, thereby increasing the liability exposure of attorneys and other advisors servicing pension plans.

An interesting example of this proposition can be found in the case of *Feagan v. Lang*³³ where the trustees of a union pension plan sued to recover \$6.52 in delinquent contributions from an employer who was subject to the union plan. The suit was motivated by the fear that failure to enforce the employer's obligation could subject the trustees to personal liability for breach of their fiduciary duties. The court awarded the trustees a judgment for the \$6.52 plus

²⁷ ERISA § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B) (1974).

²⁸ *Id.*

²⁹ ERISA § 502(a)(3), 29 U.S.C.A. § 1132(a)(3) (1974).

³⁰ ERISA § 502(a)(2),(4),(6), 29 U.S.C. § 1132 (a)(2),(4),(6) (1974).

³¹ *Supra* note 6.

³² 29 U.S.C.A. § 1132(g) (1974).

³³ 416 F. Supp. 53 (S.D. Fla. 1976).

\$200 in auditor's fees and \$350 for counsel fees. Although the court noted that ERISA normally contemplates amicable resolution of cases such as *Feagan*,³⁴ the result certainly illustrates the significant impact that recovery of attorney fees may have on the attitude of a beneficiary or trustee toward litigation.

THE ATTORNEY AS A FIDUCIARY

Perhaps one of the most significant provisions in the civil liability section of ERISA is section 502(a)(2)³⁵ which authorizes participants and beneficiaries to file suit against a plan fiduciary for the breach of any fiduciary obligation. The fiduciary is required to make good any losses or restore any foregone profits which would have resulted from the proper use of plan assets where the losses or foregone profits arise from a breach of fiduciary obligation.³⁶ The statutory definition of a "fiduciary" is broad enough to encompass most advisors who are associated with a private pension plan in any significant capacity,³⁷ and the probability of meeting the "fiduciary" criteria seems to proportionately increase with the party's involvement in plan activities.³⁸

ERISA provides that a person shall be considered a fiduciary to a plan to the extent that he or she either: (a) exercises any discretionary authority or control in the management or disposition of its assets; (b) renders investment advice or has authority to render investment advice for a fee or other compensation, direct or indirect, with regard to property or funds of the plan; or (c) has discretionary authority or responsibility in the administration of the plan.³⁹ Regulations issued by the Department of Labor construct the statutory definition somewhat in that a party performing purely ministerial duties within the framework of policies, interpretations, rules and practices formulated by others is not considered a fiduciary.⁴⁰ Such ministerial duties include the preparation of reports required by governmental agencies and the determina-

³⁴ *Id.* at 54.

³⁵ 29 U.S.C.A. § 1132(a)(2) (1974).

³⁶ ERISA § 409, 29 U.S.C.A. § 1109 (1974).

³⁷ ERISA § 3(21)(A), 29 U.S.C.A. § 1002(21)(A) (1974).

³⁸ This aspect of the Act will be developed in greater detail in subsequent sections of the note. See text accompanying notes 39-77, *infra*.

³⁹ ERISA § 3(21)(A), 29 U.S.C.A. § 1002(21)(A) (1974).

⁴⁰ 29 C.F.R. § 2509.75-8 (1975).

tion of eligibility under predetermined guidelines.⁴¹ Although the attorney may incidentally perform some of these ministerial functions, it is apparent that his normal professional advisory capacity involves much more discretion and influence on the policies and practices of the plan than was contemplated by this ministerial exception. Any person meeting the statutory fiduciary criteria is subject to certain duties imposed by the Act, the foremost of these being the duty to discharge his or her obligations solely in the interest of participants and beneficiaries.⁴² The fiduciary duty of loyalty under ERISA has been compared, in some instances, to that of a corporate director.⁴³ The fiduciary must discharge his or her obligations for the exclusive purpose of providing benefits for participants and beneficiaries and defraying the reasonable cost of plan administration.⁴⁴ Unless it is otherwise not prudent to do so, he or she must diversify the plan investments so as to minimize the risk of substantial loss.⁴⁵ Under the standard of performance provided by the Act, the fiduciary must use the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."⁴⁶ It has been suggested that use of this "like expertise" standard raises the expected conduct of the prudent investor above that of a common law "reasonable man".⁴⁷

The question thus arises as to whether the attorney who merely renders legal advice to a plan is considered a fiduciary under the statute. According to interpretive bulletins issued by the Department of Labor, the answer to this question is a qualified "no".⁴⁸ In the absence of any assertion of authority or control over the plan, attorneys, accountants, and other professionals will not ordinarily be considered fiduciaries while performing only their usual professional functions.⁴⁹ Whether or not there has been such

⁴¹ *Id.*

⁴² ERISA § 404(a)(1), 29 U.S.C.A. § 1104(a)(1) (1974).

⁴³ See Note, 88 HARV. L. REV. 960 (1975); See also Panel Discussion, *Who Are Fiduciaries?* 31 BUS. LAWYER 15, 83-98 (1975).

⁴⁴ ERISA § 404(a)(1)(A), 29 U.S.C.A. § 1104(a)(1)(A) (1974).

⁴⁵ ERISA § 404(a)(1)(C), 29 U.S.C.A. § 1104(a)(1)(C) (1974).

⁴⁶ ERISA § 404(a)(1)(B), 29 U.S.C.A. § 1104(a)(1)(B) (1974).

⁴⁷ See Little and Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1, 12-13 (1977); Note, 88 HARV. L. REV., *supra* note 43, at 965.

⁴⁸ 29 C.F.R. § 2509.75-5 (1975).

⁴⁹ *Id.* The exception for the rendering of professional services does not apply

an assertion of authority or control over the plan or its assets is essentially a factual question to be determined on a case by case basis. A critical distinction which must be made in any "control" determination is whether the attorney or other advisor has merely made recommendations to the appropriate parties for administration of the plan or whether, in essence, he or she has made the policy decisions. The fine line between these two positions can present acute problems for counsel to a small plan whose sponsor has no background or interest in the ramifications of ERISA. The employer may desire only the tax benefits of a qualified pension plan,⁵⁰ preferring to leave the administrative details of the plan to the attorney, the accountant, or any other advisor who is willing to accept the task. Furthermore, in a small plan the employer may have neither the manpower nor the inclination to handle the administrative duties imposed by ERISA. The attorney could thus be confronted with an attempted delegation of complex policy decisions which should be made by the sponsoring employer. In this situation, the attorney should make clear to the plan sponsor the scope of his or her limited advisory capacity.⁵¹

The sponsoring employer of a plan is clearly a fiduciary under ERISA,⁵² as are a plan's trustees.⁵³ It is also apparent from the Act's fiduciary definitions that anyone who renders investment advice to a plan for compensation will be considered a fiduciary.⁵⁴ Regulations issued by the Department of Labor and the Treasury Department provide that a party will be deemed to have rendered investment advice when: (a) the person renders advice as to the value of securities or other plan assets or makes recommendations as to the advisability of investing in, or disposing of, securities or other plan assets; and (b) the person either (i) directly or indirectly has discretionary authority over the purchase or sale of plan assets or securities; or (ii) renders advice on the value or viability of investments on a regular basis with the mutual understanding that such advice will serve as the primary basis for investment decisions and that the advice will be rendered on an individualized basis related to the plan's particular needs for investment strategy, port-

to services rendered by an investment advisor to a plan.

⁵⁰ A "qualified" pension plan is one which meets the substantive provisions of the Internal Revenue Code for deductibility of contributions made under the plan.

⁵¹ See text accompanying notes 64-65 for similar considerations.

⁵² 29 C.F.R. § 2509.75-8 (1975).

⁵³ *Id.*

⁵⁴ ERISA § 404, 29 U.S.C.A. § 1104 (1974); 29 C.F.R. § 2509.75-8 (1976).

folio composition or asset diversification.⁵⁵ The regulations thus suggest that in the absence of discretionary authority, fiduciary status attaches only where the advisor and the plan (i.e. the sponsoring employer or the plan trustees) mutually agree on the establishment of an advisory relationship, either by way of an express agreement or by one implied from the circumstances and predicated on the regularity with which advice is to be rendered.⁵⁶ Thus if an attorney merely renders a legal opinion as to the advisability of an investment based upon his or her interpretation of the "prudent investor" standard, the attorney would presumably be acting in the normal scope of his or her professional capacity and would not be subject to classification as a fiduciary.⁵⁷ However, if the attorney ventures beyond mere legal conclusions and gives investment advice based upon market projections or other analytical considerations, he or she could be categorized as a fiduciary rendering investment advice for consideration.⁵⁸ In determining whether an attorney has passed beyond acting merely in a legal advisory capacity and has instead entered the realm of "investment advisor," the courts may consider factors such as the regularity of "investment counseling," the extent to which any "advice" is relied upon, the nature of the attorney's expertise, the extent to which the "advice" is disclosed to interested parties and the relation between the investment counseling and the possibility of harm to the plan.⁵⁹

⁵⁵ 29 C.F.R. § 2510.3-21(c)(1) (1975).

⁵⁶ Note the language: "Renders any advice . . . on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan. . . ." 29 C.F.R. § 2510.3-21(c)(B) (1975).

Although there is some doubt about the effectiveness of a disclaimer by the advisor of his or her investment advisory status, it has been suggested that a clear written notice by the advisor, acknowledged by the plan, negating any element of authority or assent contemplated by the regulations would be effective in avoiding fiduciary status unless the actions of both parties were clearly inconsistent with the written understanding. See Miller, *Permanent Regulations and Exemptions Under ERISA: Clarification or Confusion for Securities Firms?* 4 SEC. REG. L. J. 306, 308 (1976); and GERARD & SCHREIBER, *SECURITIES INVESTMENTS UNDER ERISA* 65-114, (N.Y.U. Inst. Fed. Taxation (ERISA supp.), vol. 35 (1977)). Such notice clause could easily be incorporated into any engagement agreement between an attorney and a plan.

⁵⁷ See Panel Discussion, *Who Are Fiduciaries?*, *supra* note 43 at 83-98.

⁵⁸ Note, 30 VAND. L. REV., *supra* note 47, at 4.

⁵⁹ Address by William J. Kilberg, Nov. 21, 1974, reprinted in [1974] 3 PENS. & PROFIT SHARING (P-H) ¶ 135,013.

Sometimes an attorney may be asked to formulate changes in the funding medium of a plan, to assist, for example, in a rollover from a common fund to a trust, or to terminate a plan entirely. Again the investment advisory status of an attorney handling the termination or change in funding medium of a plan may turn on his or her discretionary authority to purchase or sell plan assets or securities. If the attorney is merely acting at the direction of the fiduciary charged with administration of the plan, then the investment advisor-fiduciary status presumably would not attach.⁶⁰ In addition, at least one case has suggested that merely acting as a custodian of plan assets, as the attorney may be called upon to do in a termination process, does not establish a fiduciary relationship under the Act.⁶¹ If, however, the attorney makes recommendations as to the advisability of investing in or disposing of securities or other plan assets *and* has discretionary authority over such purchase or disposition, he or she then meets the regulation requirements for status as an investment advisor and therefore is a fiduciary if the advice is rendered for compensation.

In the ordinary operation of a plan, or in extraordinary situations such as a rollover or termination, retention of an investment manager or stock broker, as is usually the case with a moderate to large-sized plan, would decrease the possibility that a plan attorney would be subject to liability as a fiduciary for the rendering of investment advice. The danger increases, however, in a small plan setting where the accumulation of assets might not support the utilization of an independent investment manager. In a small plan, the investment duties usually fall upon either the employer, the trustees, or an investment committee. Some of the parties charged with the investment obligations may not have a great deal of financial acumen and might seek the advice of counsel as to the optimum investment medium. In dealing with a small plan guided by

⁶⁰ GERARD & SCHREIBER, *SECURITIES INVESTMENTS UNDER ERISA* 71-73 (N.Y.U. Inst. Fed. Taxation (ERISA Supp.), vol. 35 (1977)).

⁶¹ *Hibernia Bank v. International Brotherhood of Teamsters*, 411 F. Supp. 478 (N.D. Cal. 1976). In that case, the court held that a bank who held plan funds in a regular account was not a fiduciary because it did not have the requisite discretionary authority or control over the plan assets. The bank was permitted to pay money out of the account, but only at the direction of a plan trustee. The court noted that a custodian could be a fiduciary, but the inclusion of the term fiduciary in the definition of a "party in interest" under Section 3(14) of ERISA, 29 U.S.C.A. § 1002(14) (1974), does not enlarge the definition of a fiduciary under Section (3)(21), 29 U.S.C.A. § 1002(21) (1974). *Hibernia Bank* at 490.

inexperienced investors, counsel should recommend a reliable investment institution such as a bank, an insurance company or a mutual fund that has competent representatives who will service the plan's account.⁶² Such organizations usually provide counseling of such an account for a nominal management fee and can assist in compiling data for the various reports required of the plan.⁶³

Even though an attorney may not render "investment advice", he or she may nonetheless exert sufficient influence and control over the administration of a plan to warrant the finding that a fiduciary capacity exists. Questions and answers issued by the Department of Labor to supplement section 3(21)(A)⁶⁴ of ERISA point out that in disputes over the interpretation of plan provisions regarding eligibility, any person who has final authority to authorize or disallow benefit payments is a fiduciary under the Act.⁶⁵ Use of the term "final authority" suggests that the attorney may provide a legal opinion as to the interpretation of the plan without being a fiduciary, but that he or she should specify that the ultimate decision of affirming or denying the benefits in question is that of the responsible party under the plan, or if none is so designated, then the sponsoring employer. The same standard applies to plan amendments and modifications; the attorney may provide his or her legal opinions as to compliance or may draft substitute provisions designed to comply with ERISA, but the ultimate decision on the amendments must come from the sponsoring employer. Even though as a practical matter the employer's exercise of authority over a small plan may require little more than a "rubber stamp" of approval, such mechanical approval may be

⁶² The recommendation of an investment institution does not appear to be within the scope of activities contemplated by the definition of rendering "investment advice". See text accompanying note 55 for what constitutes rendering investment advice.

⁶³ The utilization of the investment organization for preparation of the various reports which must be filed with governmental agencies can reduce the administrative burden of the plan manager and produce efficiency savings for the plan. The investment organization will compile most information needed for the various reports in the ordinary course of business and transfer the information to other advisors for preparation of the reports. Many small plans can utilize the computerized facilities of insurance, trust, or mutual fund organizations and the management fee charged for these services is often less than the cost of having the reports prepared by another advisor such as the plan's accountant.

⁶⁴ 29 U.S.C.A. § 1002(21)(A) (1974).

⁶⁵ 29 C.F.R. § 2509.75-8 (1975).

crucial in a small plan situation where the attorney has a wide degree of influence. In any situation involving discretion or policy decisions affecting the plan, the attorney rendering advice should document the final exercise of authority by the sponsoring employer or other responsible party. Such documentation might consist of a letter affirming the role of each party in the decision-making process or an authenticated summary of the meeting at which the action was taken or authorized. Either document should reflect the attorney's recommendations and the employer's adoption of the suitable alternative. The use of these devices could prove helpful in avoiding or negating subsequent claims that the attorney exercised managerial authority in the adoption of policies or practices governing the administration of the plan.

In some instances, an employer with a small plan may request that the plan attorney serve as a member of the trustee committee or as an individual trustee for the plan. The attorney should cautiously consider such a request, since trustees are clearly fiduciaries under ERISA.⁶⁶ An important consideration in this situation is the fact that in addition to his or her own liability, a trustee may be liable for the actions of other trustees under the co-trustee provisions of section 406 of the Act.⁶⁷ Indeed, where a majority of trustees appears ready to take action which would clearly violate provisions of ERISA, it becomes incumbent upon minority trustees to take adequate and reasonable steps to prevent the transaction.⁶⁸ Such steps could include seeking an injunction under 502(a)(3)⁶⁹ of the Act, publication of the vote on the issue, or notification of the Department of Labor.⁷⁰ Once the minority has knowledge that imprudent action is being contemplated, mere resignation by any of the minority trustees without any action to prevent the imprudent conduct of the majority is not enough to avoid liability for the

⁶⁶ *Id.*

⁶⁷ 29 U.S.C.A. § 1105 (1974). The section provides that a fiduciary may be liable for a breach of fiduciary responsibilities of another fiduciary if he knowingly participates in an act or omission of another fiduciary which constitutes a breach or if he has neglected his fiduciary duties in employing the second fiduciary. The fiduciary may also be liable for knowledge of the breach by the second fiduciary unless he has made reasonable efforts to remedy the breach.

⁶⁸ 29 C.F.R. § 2509.75-5 (1975).

⁶⁹ 29 U.S.C.A. § 1132(a)(3) (1974). The section provides that any fiduciary can bring civil action to enjoin any act or practice which violates any provisions of the Act or of the terms of the plan.

⁷⁰ 29 C.F.R. § 2509.75-5 (1974).

majority's action.⁷¹ Similarly, the resignation of an individual trustee in protest of a breach of fiduciary duty committed by a co-trustee will generally be considered insufficient to discharge his or her positive duty to make reasonable efforts to remedy the breach.⁷² Thus, in order to avoid the personal liability imposed for failure to take remedial measures, the attorney-trustee may be forced, in his or her fiduciary capacity, to initiate legal proceedings against his or her own clients who may be co-trustees, management or plan participants. These possibilities should impose powerful constraints on the willingness of attorneys to act as plan trustees. The character, judgment and background of other proposed trustees, whether any participants or beneficiaries will serve as trustees, the financial stability of the sponsoring employer and the coverage afforded such activities within the scope of his or her malpractice insurance are factors an attorney should carefully evaluate before accepting a position as a plan trustee.⁷³

Like the attorney-trustee, an attorney who serves on the board of directors of a sponsoring employer faces fiduciary responsibilities. ERISA anticipates that members of the board of directors of plan-sponsoring employers will be fiduciaries to the extent that they exercise discretion or control over the employee plan.⁷⁴ The board of directors may be responsible for the selection, retention or replacement of plan fiduciaries, and, as such, it is vested with the requisite amount of discretion to qualify the group as fiduciaries.⁷⁵ Since the responsibility of the board, however, is limited to this function of selection, retention or replacement, fiduciary liability is thus limited proportionately. Nonetheless, the directors must have acted prudently and exercised ordinary care in the selection, retention or replacement process and there must be no reason to doubt the competency, integrity or responsibility of the parties selected. Under section 405(a) of the Act, failure to meet these standards may expose the directors to liability for any breach of fiduciary duties by the chosen subordinates.⁷⁶ Furthermore, the directors must review, at reasonable intervals, the performance of trustees or other fiduciaries to ensure that their performance has

⁷¹ *Id.*

⁷² *Id.*

⁷³ R. BILDERSEE, PENSION REGULATION MANUAL, Vol. I § 20.7.4 at 338 (Rev. ed. 1978).

⁷⁴ 29 C.F.R. § 2509.75-8 (1975).

⁷⁵ *Id.*

⁷⁶ 29 U.S.C.A. § 1105(a) (1974).

been in compliance with ERISA and the terms of the plan and that their actions have substantially met the needs of the plan.⁷⁷ No exact formula is given for this review process but the procedure must reasonably assure a fair evaluation of performance based upon the nature and organization of the plan and its funding scheme.

In the event that a plan attorney meets the fiduciary criteria and thus is subjected to the previously outlined loyalty constraints,⁷⁸ a serious conflict of interest may arise if the employer is sued by a plan participant or beneficiary. While the employer may have initially retained the attorney in anticipation of the possibility of such litigation, the attorney's status as a fiduciary to the plan may preclude him or her from defending the employer. Section 406(b)(2)⁷⁹ of ERISA provides that a fiduciary shall not, with regard to the plan, act in his individual or other capacity on behalf of a party whose interests are adverse to those of the plan or its participants or beneficiaries. The intent of this provision is to prevent "a fiduciary from being put in a position where he has dual loyalties, and, therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries."⁸⁰ A possible resolution of this dilemma may be arguably found in section 408(c)(3)⁸¹ which provides that the loyalty constraints of section 406 do not prohibit a fiduciary from serving as an officer, employee, agent or representative of a party-in-interest while also serving as a fiduciary. This exception, however, appears to be for the limited purpose of allowing owner-employees to serve as fiduciaries and as such would have a minimal impact on the prohibitions of section 406.⁸²

The two provisions were considered in *Curren v. Freitag*,⁸³ a case involving a collectively-bargained union pension fund. In this case, a pension fund was established by a trust agreement which required sixteen trustees: eight appointed by the employee's union and eight appointed by two employers' associations. The plaintiffs, trustees appointed by the employers, brought suit alleging defects in the structure and operation of the fund and sought to hold the

⁷⁷ 29 C.F.R. § 2509.75-8 (1975).

⁷⁸ See text accompanying notes 42-46.

⁷⁹ 29 U.S.C.A. § 1106(b)(2) (1974).

⁸⁰ H. CONF. REP. NO. 93-1280, *supra* note 23 at 5089.

⁸¹ 29 U.S.C.A. § 1108(c)(3) (1974).

⁸² H. CONF. REP. NO. 93-1280, *supra* note 23 at 5092.

⁸³ 432 F. Supp. 668 (S.D. Ill. 1977).

trustees representing the union personally liable under ERISA fiduciary provisions. The defendants counterclaimed against the employer trustees collectively for breach of fiduciary duties to the fund in instigating the lawsuit and against the plaintiff trustee Curren individually for violating ERISA section 406(b)(2) by actively representing certain contractors who refused to make required contributions under the plan. The counterclaim more specifically asserted that Curren counseled two employers to resist audits ordered by the fund and to refuse payment demands by the fund because, in his opinion, the audits and subsequent lawsuits were not properly authorized by the fund trustees. Curren responded that he had given his opinion that the audits and lawsuits were improperly authorized, but that such opinion was given in the course of his duties as director of labor relations of the employers' associations and that his activities in that capacity did not violate his fiduciary duties to the fund.

Citing section 408 of ERISA as the controlling authority, the court rejected the allegations that Curren's actions on behalf of the employers' associations were "at total war" with his obligations as a trustee of the fund. The opinion noted that since section 408 allowed Curren to act in both capacities, it would be illogical to require him to forego the rendering of advice and assistance that he would have been expected to give to the employers' associations had he not been a trustee of the fund. The court then specifically addressed the question of

whether counseling parties to resist audits and to refuse payment to the Fund, suggesting of specific legal counsel to them, participating in meetings concerning their legal defense and issuing a 'bulletin' advising adverse parties of an allegedly improper collection effort, constitutes acting on behalf of an adverse party in any transaction involving the plan within the meaning of 29 U.S.C. § 1106(b)(2).⁸⁴

The court held that to give the section the broad reading urged by the counterclaimants would require a fiduciary who also serves as an employee of a party-in-interest to neither inform nor counsel his employer as to his opinion of the propriety of actions taken by the fund. The court rejected the imposition of such a bifurcated standard upon the trustee and stated that a workable construction of the two statutory provisions "would prevent the fiduciary from

⁸⁴ *Id.* at 672.

being placed in a position where he was dealing with the Fund on behalf of his employer in a matter concerning the assets of the Fund.”⁸⁵ “Dealing” was defined as meaning the fiduciary had the power to compromise the positions of the employer, the plan or both. The court emphasized that the critical distinction was between advocating a course of action or a solution and actually having the power to adopt that course of action or implement the solution. This interpretation would prohibit a fiduciary who is serving dual roles from holding a position which authorizes him to accept on behalf of the plan, a compromised settlement of less than the amount properly due the plan, but would not prohibit the fiduciary from advising his employer that the plan might accept such a reduced amount. The court held that Curren’s actions were in a general sense adverse to the interests of the beneficiaries of the fund, since his advice of refusing payment would result in increased collection costs to the pension fund. However, the court held that the actions at best could be characterized as giving aid and comfort to an adverse party but they did not constitute acting on behalf of an adverse party within the meaning of section 406(b)(2).⁸⁶ The decision typifies the difficulties encountered when the dual roles of advisor and fiduciary are intertwined. Although the court held that Curren had not breached his fiduciary duties, it is possible that his dual involvement would have been more closely scrutinized if he had been an attorney directing the legal action.

The concept of the pension plan as a separate entity under ERISA may be difficult for some attorneys to accept since they formerly provided advice for a plan as a consequence of their services for the employer.⁸⁷ The *Curren* decision suggests, however, that the safest, most practical course for the attorney is the utilization of a separate employment arrangement with the pension plan, or at least the inclusion of some provision in the plan for retention of separate counsel in the event a conflict like that in *Curren* should arise. From a purely pragmatic approach, any litigation between a plan and its sponsoring employer would require the application of normal professional standards regarding conflict of interest, and as such the plan would require separate legal representation.⁸⁸

⁸⁵ *Id.*

⁸⁶ 29 U.S.C.A. § 1106(b)(2) (1974).

⁸⁷ Panel Discussion, *Who Are Fiduciaries?*, *supra* note 43, at 83-94.

⁸⁸ See ABA CANONS OF PROFESSIONAL ETHICS No. 5. For a comment on the han-

THE ATTORNEY AS A PARTY-IN-INTEREST

As contrasted with the factual inquiries necessary to apply the fiduciary provisions of ERISA, counsel to a private pension plan is clearly designated as a party-in-interest under the Act.⁸⁹ Section 406⁹⁰ imposes limitations on any transactions between a plan and a party-in-interest which would constitute the sale, exchange or leasing of any property; the extension of credit; or the furnishing of goods, services or facilities.⁹¹ The section also prohibits any transfer to, or the use of, plan assets by a party-in-interest.⁹² While some of the restrictions imposed by section 406 are relaxed by specific exemptions,⁹³ the limitations are otherwise to be strictly administered,⁹⁴ and failure to observe them could subject a party-in-interest to a civil penalty imposed by the Secretary of Labor of up to 100% of the amount involved in the prohibited transaction.⁹⁵

The section 406 prohibited transaction rules seem to preclude an attorney from providing services to a plan for a fee. Section 408(b)(2), however, contains an express exemption from the section 406 prohibitions so that a plan may contract with a party-in-interest for legal, accounting, or other services necessary for the operation and administration of the plan.⁹⁶ The exemption is limited, however, to only reasonable compensation for such services as are rendered.⁹⁷ Thus, an attorney who provides services for a plan and charges excessive fees for such services has technically entered into a prohibited transaction to the extent that his fees exceed reasonable compensation. Such an event might also justify the termination of the employment agreement between the plan and the attorney.⁹⁸

It is important to note also that the exemption of section 408 applies only to services that are both reasonable *and* necessary.

dling of potential conflicts in non-litigating counseling, see Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 727-28 (1977).

⁸⁹ ERISA § 3(14), 29 U.S.C.A. § 1003 (1974).

⁹⁰ 29 U.S.C.A. § 1106 (1974).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See ERISA § 408, 29 U.S.C.A. § 1108 (1974).

⁹⁴ ERISA § 408(a), 29 U.S.C.A. § 1108(a) (1974).

⁹⁵ ERISA § 502(i), 29 U.S.C.A. § 1132(i) (1974).

⁹⁶ 29 U.S.C.A. § 1108(b)(2) (1975).

⁹⁷ *Id.*

⁹⁸ H. CONF. REP. NO. 93-1280, *supra* note 23, at 5092.

Services rendered by counsel who is receiving full time pay from an employer, except for reimbursement of expenses properly and actually incurred and not otherwise reimbursed, are not covered.⁹⁹ Thus, if a compensation agreement is based upon salary, a lawyer could not recover fees for litigation as an element of an award. The purpose of this rule is to prevent double payment for services.¹⁰⁰ In *Huge v. Old Home Manor, Inc.*,¹⁰¹ a case involving issues similar to those in the *Feagan* case,¹⁰² the trustees of the United Mine Workers (UMW) pension plan brought an action to compel the defendant coal operator to make timely royalty payments to the UMW pension fund. The court held that the defendant had paid the royalties due the plan but such payments were consistently late and therefore the plaintiffs were entitled to interest on the late payments at a rate of 6% per annum for a period of 18 months, in the amount of \$6,430.71. In addition to the interest, the court awarded the plaintiffs court costs of \$195.53 and fees of outside counsel in the amount of \$2,218.¹⁰³ The court, however, refused to award \$750 claimed by plaintiff as fees for house counsel due to counsel's salaried employment by the UMW fund. The court also disallowed an award of \$1,304, requested by plaintiff as costs of an audit conducted by the fund. The court rejected the claim because the auditor was employed by the fund and the fund customarily bore the expense of periodic audits. The court did allow an award of \$426 to cover the travel expenses of house counsel.

Thus, as demonstrated in *Huge*, an attorney contemplating an employment contract with a pension plan should take steps to safeguard against the party-in-interest pitfalls. Since the compensation arrangement could be subject to judicial review for reasonableness, the attorney should document the amount of time expended and the nature of the services rendered to the plan. Should the underlying nature of the service agreement be challenged the attorney must also be prepared to justify the necessity of any services rendered. Furthermore, since under section 408 a plan may terminate a service agreement under circumstances disadvantageous to the plan, the agreement should address the issues of no-

⁹⁹ *Id.*

¹⁰⁰ ERISA § 408(c)(2), 29 U.S.C.A. § 1108(c)(2) (1974).

¹⁰¹ 419 F. Supp. 1019 (W.D. Pa. 1976).

¹⁰² *Supra*, note 33.

¹⁰³ Recall that the statute provides for reasonable compensation. See text accompanying note 97, *infra*.

tice, contingencies, and the conditions under which such a termination would be effective.

The prohibitions of section 408 which preclude a party-in-interest from purchasing property or securities of a plan or borrowing money therefrom¹⁰⁴ are another major concern for an attorney advising a plan and the sponsoring employer on transactions conducted between them.¹⁰⁵ Small employers, for example, may look at employee pension plans as a source of funds to meet temporary cash shortages. They may also view their required payments to the plan as an obligation that can be postponed in order to relieve an impending cash squeeze. Loans from the plan to the sponsoring employer, however, are prohibited unless they come under one of the exemptions of section 408(b).¹⁰⁶ Since the above circumstances would not fall within these exemptions, such transactions would be prohibited, and their consummation could subject the employer to civil penalties,¹⁰⁷ as well as constitute a breach of fiduciary duties by the trustees of the plan.¹⁰⁸ The temptations for the small employer to utilize pension funds to meet business exigencies during periods of economic crisis could be immense, yet under these circumstances, the attorney must stress the necessity of maintaining the segregation and integrity of the pension funds and the consequences of participating in a prohibited transaction.

The limitations imposed on employer-plan transactions raise an interesting question under the fiduciary standards of ERISA as

¹⁰⁴ ERISA § 406(a)(1), 29 U.S.C.A. § 1106(a)(1) (1974).

¹⁰⁵ See ERISA § 407, 29 U.S.C.A. § 1107 (1974). There are limitations imposed on the amount of a sponsoring employer's securities that may be held by the pension plan, and the restrictions also apply to the securities of affiliates of the employer.

¹⁰⁶ 29 U.S.C.A. § 1108(b) (1974). This section provides in part:

(b) The prohibitions provided in section 406 shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

¹⁰⁷ *Infra*, text accompanying notes 24-30 and 36.

¹⁰⁸ *Infra*, text accompanying notes 36 and 42-46.

to whether a plan, by its trustees, can compromise amounts due the plan by a sponsoring employer. The question becomes very important for the plan attorney conducting litigation against an employer for past due contributions. Although there has been no clear judicial pronouncement on this question, the cases¹⁰⁹ suggest that trustees of a plan should be extremely cautious in settling claims against sponsoring employers for less than the full amount due. It has been suggested that the fiduciaries should be guided by the prudent man standard in weighing any compromise and that prudent persons do compromise their positions in appropriate circumstances.¹¹⁰ In situations where the advantages and disadvantages of a suit are relatively even, the appropriateness of a compromise might be offset by the availability of court costs and attorney's fees as an element of recovery and thus compel litigation to enforce collection of past due payments.¹¹¹

ADVISING THE PLAN ADMINISTRATOR

Under ERISA, every plan must have an administrator who is responsible for meeting certain disclosure and reporting requirements.¹¹² Where the administrator is not designated by the operative plan instrument, the plan sponsor assumes the role. In the case of a plan established by a single enterprise, the plan sponsor is the employer. If a plan is established by more than one employer, the sponsor could be an employee organization, such as a union, or an employers' association. A plan administrator may or may not be a fiduciary depending upon the extent of his or her vested discretionary authority, but he or she would probably at least be a party-in-interest. These designations, however, are independent of the various reporting and disclosure responsibilities imposed by the Act.

The plan administrator is required to furnish each plan partic-

¹⁰⁹ *Curren v. Freitag*, 432 F. Supp. 668 (S.D. Ill. 1977); *Eaves v. Penn*, 426 F. Supp. 830 (N.D. Okla. 1976); *Feagan v. Lang*, 416 F. Supp. 53 (S.D. Fla. 1976).

¹¹⁰ *Feagan v. Lang*, 416 F. Supp. 53, 54 (S.D. Fla. 1976).

¹¹¹ *Id.*

¹¹² See ERISA § 101(a),(b), 29 U.S.C.A. § 1021(a),(b) (1974). The committee report on ERISA suggests that the restrictive nature of the exemption was to promote arrangements which would allow a plan to terminate services on reasonably short notice so that a plan would not become locked into an arrangement that might become disadvantageous. The exemption also anticipates that the compensation arrangement will allow for modification, such that the plan will not be bound to a disadvantageous price.

ipant with certain statements and reports including summary plan descriptions, summary annual reports, and reports of the participants' benefit rights.¹¹³ In addition, the administrator must file informational reports with the Secretary of Labor and the Treasury Department.¹¹⁴ Failure to abide by these requirements could subject the administrator to criminal sanctions of fines and/or imprisonment for wilful violation of the disclosure provisions or to civil liability in a suit by a participant or beneficiary who has requested certain information and been refused without just cause.¹¹⁵ A plan's attorney, accountant, actuary and other advisors play important roles in assisting the administrator in the preparation of required reports. A summary plan description which includes an explanation of the plan's eligibility, disqualification, vesting and funding provisions, as well as the procedures for presenting claims for benefits and the remedies under the plan for the denial of such claims must be provided to all plan participants and beneficiaries.¹¹⁶ Furthermore, the description must be "written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."¹¹⁷ Considering the highly technical vesting and eligibility provisions contained in some plans, this standard is often difficult to meet, and the plan attorney is often in the best position to provide interpretation of the various plan provisions for the administrator.

The disclosure and reporting requirements become especially burdensome for a small plan administrator. In preparing the required reports for the Department of Labor, the Treasury Department and the Pension Benefit Guaranty Corporation,¹¹⁸ along with statements for the plan participants and beneficiaries, the administrator of a small plan can easily be overwhelmed with paperwork. An employer may not have the manpower to permit one

¹¹³ ERISA § 101(a),(b), 29 U.S.C.A. § 1021(a),(b) (1974).

¹¹⁴ *Id.*

¹¹⁵ See text accompanying notes 22 and 24-26, *supra*.

¹¹⁶ ERISA § 102(a)(1), 29 U.S.C.A. § 1022(a)(1) (1974).

¹¹⁷ *Id.*

¹¹⁸ The Pension Benefit Guaranty Corporation was established by the Act to protect plan participants and beneficiaries from loss of pension benefits upon the failure or termination of the plan or of the sponsoring employer's enterprise. The Corporation is funded by contributions required of defined benefit plans under ERISA; the contribution is based upon a rate per participant in the plan.

employee to devote full time efforts to the duties of administering the plan, and consequently the administrator of a small plan is frequently a management employee who has many other responsibilities. In this situation, much of the report preparation is delegated to an advisory team consisting of the plan attorney, an accountant, and a representative of an investment institution, such as an insurance agent, bank trust officer, or mutual fund advisor. The costs of such professional services can make administration of a small plan financially prohibitive unless the functions of each advisor are coordinated to eliminate any duplication of information or delay in report preparation. Toward this end, the plan attorney should meet with the plan's administrator, accountant, and other advisors to delegate various functions, to set a timetable for the preparation of various reports, to exchange information which might be required of the other advisors in performing their tasks and to discuss any additional problems which might be encountered. In addition to saving money for the plan or the plan sponsor, such coordination will also promote more accurate reports and statements, while at the same time allowing the plan administrator to discharge his duties more efficiently.

An important question arising from the delegation of the report preparation duties is the extent to which the responsibility for false statements or concealed facts is transferred to the advisor who prepares the reports. Decisions under the Welfare and Pension Plan Disclosure Act¹¹⁹ reject the contention that an administrator may transfer his responsibility for accurate reporting, and although the Disclosure Act has been superceded by ERISA, the nature of the reporting duties under the two statutes is similar.¹²⁰ It was held in *United States v. Santiago*,¹²¹ that an administrator could not transfer the responsibility for substantial understatement of contributions by employees to the accountant who prepared certain disclosure reports since the accountant was not hired to conduct an audit or to verify the accuracy of financial information supplied to him.¹²² In *United States v. Talkow*,¹²³ an adminis-

¹¹⁹ Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed by ERISA 29 U.S.C.A. §§ 1001-1381 (1974)).

¹²⁰ Compare 18 U.S.C.A. § 1027 (1974) with the original version at Pub. L. No. 87-420, § 17(c), (1962), 76 Stat. 42.

¹²¹ 528 F.2d 1130 (2d Cir. 1976) *cert. denied* 425 U.S. 1972 (1976).

¹²² Note that under section 103 of ERISA, 29 U.S.C.A. § 1023, an audit conducted by a public accountant is required in some instances.

¹²³ 532 F.2d 853 (2d Cir. 1976).

trator was convicted for his deliberate failure to disclose certain party-in-interest loans in the fund's annual financial reports. The administrator stated that he had not read the reports and that the fund's accountant was responsible for their preparation. The court nevertheless held that the signature of the administrator on the report was *prima facie* proof of his knowledge of the contents and that he was precluded from relying upon the accountant's preparation of the reports to insulate himself from liability. The court noted that the defendant had failed to disclose his interest in certain corporations to which the fund had made loans and that an assertion of reliance upon an accountant's work is never a defense to fraudulent nondisclosure where the defendant has not disclosed all of the material facts to the accountant.

These cases suggest two important points for the attorney who is advising a plan administrator. First, the attorney's responsibility for the contents of any report prepared by him or her for the administrator will usually be limited by the veracity of the information supplied by the administrator. Knowledge of facts or circumstances obtained from incidental sources during the rendering of regular services to the plan, however, might provide a possible exception to this axiom. If, for example, the attorney learns of party-in-interest transactions while assimilating financial data for inclusion in the annual reports, he or she should confront the appropriate party with the information and seek to include such information in the reports if it could have a material impact upon the interpretation and evaluation of the reports. Secondly, the attorney should advise the plan administrator of the duty to examine and verify the contents of the various reports required by ERISA. The administrator should be fully apprised that his or her signature on the reports and statements establish a *prima facie* case of knowledge of the contents. It is important, therefore, that procedures be developed to verify the accuracy and completeness of data comprising the reports. The cooperation of the various advisors in compiling information and the adoption of procedures which include some form of cross-checking and collaboration will help eliminate needless mistakes which could result in costly litigation.¹²⁴

¹²⁴ A system of cross-checking can be developed by utilizing the interrelated nature of the various advisors' duties. The plan attorney should develop a plan synopsis summarizing all of the significant plan aspects reflecting amendments if any. The plan synopsis should be provided to the accountant or other advisor who

ALTERNATIVES

The expanded liability and reporting burdens imposed by ERISA have caused a number of plan sponsors to re-evaluate the benefits of sponsoring an employee pension plan. Furthermore, nondiscrimination provisions,¹²⁵ which require the admission of more employees and promote equal participation opportunities for non-management workers, have greatly increased the cost of maintaining a plan. Funding and vesting requirements¹²⁶ have created

is charged with the duty of preparing the annual reports to be filed with the Department of Labor and the IRS. The attorney may want to review with the plan sponsor any information about participation, vesting, and funding. The periodic review of the actual operation of these provisions as reflected by the information contained in the reports will enable the attorney to keep abreast of fluctuations in the plan which could make modification necessary. The financial information contained in the report should be verified by a second source if possible. An example of this process would be checking financial information supplied to the report preparer by the plan sponsor against a funds statement supplied by the custodian of the plan assets. Many of the verification functions can be delegated among the advisory team and the attorney may serve as a co-ordinator of the functions to promote a complete and thorough presentation of information.

One area of particular concern in the preparation of the reports involves extracting information from the plan sponsor. Often the plan sponsor may be unaware of his duty to report certain transactions or the prohibitions against them. The problem is basically one of discovery and the use of a questionnaire may tend to alleviate the difficulties. The questionnaire should be relatively simple and should address the types of transactions that the attorney is concerned with (i.e. are any payments or contributions due from the sponsor under the plan past due?). The questionnaire can be developed in cooperation with other advisors who take part in preparing the reports. It can serve as a valuable tool in preventing the types of nondisclosures exhibited in the *Santiago* and *Tolkow* cases discussed above.

¹²⁵ ERISA § 202, 29 U.S.C.A. § 1052 (1974).

¹²⁶ The funding provisions are found in ERISA §§ 301-306, 29 U.S.C.A. §§ 1081-1086 (1974). The vesting requirements are found in ERISA § 203, 29 U.S.C.A. § 1053 (1974). The funding provisions generally require that the plan sponsor contribute the amount necessary to cover the present cost of providing future benefits and an amount to amortize any unfunded past service that will be considered in computing future benefits. Normally the calculation of the amount to be funded requires an actuarial calculation based upon the ages of the participants, the respective anticipated retirement dates, mortality projections, investment return and other factors. Usually the only types of plans which involve an annual funding requirement are those which provide a determinable benefit amount that can be projected at any point in time. Such plans are usually designated as "defined benefit plans". This type of plan may be contrasted with a profit sharing plan where the sponsor makes contributions according to a formula based upon the sponsor's profit level. Since future profits can not be predicted with any degree of certainty, the individual participants' future benefit rights can not be computed and generally profit sharing plans are not subject to the funding standards.

cash flow difficulties in some instances, and the cost of administration under the various reporting and disclosure requirements of ERISA have increased so rapidly as to make continuation of some plans financially prohibitive. The cumulative result of these factors has been the termination of some 14,000 plans since the enactment of ERISA.¹²⁷ Additionally, more sponsors are looking for alternative means of providing employee plans without incurring the burdens of ERISA.

Enactment of the Revenue Act of 1978,¹²⁸ created one such alternative with its "Simplified Employee Pension" provisions.¹²⁹ Beginning in 1979, employers will be allowed to provide retirement benefits through contributions to employees' Individual Retirement Accounts (IRA's) instead of maintaining a qualified employee pension plan.¹³⁰ The use of individual IRA's is not subject to ERISA since the "plan" is maintained by the individual employees rather than the employer. The employer is merely required to make contributions under a definite written allocation for-

¹²⁷ Turpin, *Trust Industry Update—New Legislative Developments*, 116 Tr. & Est. 244, 246 (1977).

¹²⁸ Pub. L. No. 95-600 (1978).

¹²⁹ Revenue Act of 1978 § 152 (1978); Internal Revenue Code of 1954 § 408(j-1) as amended.

¹³⁰ Individual Retirement Accounts (IRA's) were authorized by ERISA as a means for providing employees who were not covered by an employer-maintained plan a chance to establish their own individual retirement program. The Internal Revenue Code § 408 defines an IRA as "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries. . . ." I.R.C. § 408(a). Under the new simplified IRA provisions each employee establishes his or her own IRA which is governed by IRA rules as to distributions, withdrawals, and other activities. I.R.C. § 408(a)(1-6); 408(d)(4); 408(e),(f),(h),(i). Employers can make direct contributions to the employee's IRA and the contributions are deductible by the employer as a salary expense and includible in the employee's income. See S. REP. NO. 95-1263, 95th Cong., 2nd Sess. 91, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 6854. The employee is then granted an offsetting deduction for the employer's contributions up to the lesser of \$7,500 or 15% of earned income. I.R.C. § 219. The employee may make his or her own contributions to the IRA account which are still subject to the regular IRA limitations of 15% of earned income or \$1,500. I.R.C. § 408(a)(1), 408(j). If an employer's contributions to the IRA equal or exceed the regular IRA \$1,500 or 15% ceiling, the employee cannot make any contributions for the tax year, even if the employer's contributions do not reach the 15% or \$7,500 deductible limit for employer contributions. If, however, employer contributions are less than the regular IRA deduction limits (15% or \$1,500) the employee may contribute the balance up to the regular limits. I.R.C. § 408(a)(1), 408(j).

mula.¹³¹ The new simplified pension plans also provide greater flexibility for employers. Under a simplified plan, the employer makes contributions to the employees' IRA's at his discretion. Contributions can thus be suspended or reduced from year to year, giving the employer more control over the financial conditions under which pension funds are provided. Additionally, under the simplified plan, the employee maintains and controls the administration of his individual pension. The self-policing policy sought in ERISA and previous legislation is thus achieved.¹³² The simplified pension plan represents a viable alternative for the small employer who maintains a relatively small work force and who cannot afford the headaches and financial burdens imposed by ERISA.

CONCLUSION

ERISA represents the product of ten years of consideration, contemplation and debate over the need for federal regulation of private pension plans. Although it provides many reforms which strengthen the overall system, the Act has been an administrative nightmare. Much of the confusion and frustration created by ambiguous regulations and duplicated reporting requirements stems from the dual administrative responsibilities delegated to the Department of Labor and the Treasury Department. President Carter responded to criticism of this dual jurisdiction by adopting the ERISA Reorganization Plan¹³³ which provides for segregation of the responsibilities between the departments. The plan contemplates simplification of the reporting requirements and reformation of the reporting standards to ease the paperwork crunch encountered by many plan managers.

¹³¹ The requirements which an employee must satisfy to share in the allocation and the manner in which the amount allocated is to be computed (i.e. what basis will be used for the allocation) must be spelled out in a definite allocation formula. The formula must provide nondiscriminatory contributions for each employee over age 25 who has performed services for the employer during any part of three out of the five preceding calendar years, and cannot discriminate in favor of an employee who is an officer, shareholder, or a highly compensated individual. The new provisions also require that employers who make contributions to a simplified plan must file such reports as the Secretary of the Treasury may require by regulation. I.R.C. § 408(k),(l). The Committee Report on the legislation notes, however, that such requirements are anticipated to be minimal. S. REP. No. 95-1263, 95th Cong., 2nd Sess. 91, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 6854.

¹³² See text accompanying note 31, *supra*.

¹³³ ERISA Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (1978).

The reorganization plan, however, is only of an interim nature, and further modifications of ERISA could be forthcoming amid angry complaints and plan terminations. Until such modifications are implemented, however, ERISA can represent a dangerous trap for unwary plan-sponsoring employers and advising attorneys. A thorough examination of the Act's provisions and well developed plan documents and articles are therefore essential to protect both employer and advisor alike from the liability hazards of ERISA.

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